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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1963

No. [redacted]712

BAYARD EDWARD RYAN, - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, *infra,* pp. 9-14) is reported at 320 F. 2d 500 (1963). The opinion of the Federal District Court is not officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on August 1, 1963 (Appendix A, *infra,* p. 15). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTION PRESENTED.

In making an examination of the taxpayer's filed income tax returns for twelve years, for which years the assessment and collection of additional taxes were long since barred by all statutes of limitation except by proof of fraud, an agent of the Internal Revenue Service issued a summons for the taxpayer to produce his books for these twelve years. Where the taxpayer did not produce the books, the question is whether the agent is entitled to enforcement by the District Court of the summons when he merely says or testifies that the books are necessary for this examination. Or, whether he must establish to the satisfaction of the District Court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe that the taxpayer was guilty of fraud.

STATUTES INVOLVED.

The pertinent provisions of Sections 7602, 7604, and 7605 of the Internal Revenue Code of 1954 are set forth in Appendix B, *infra,* pp. 16-17.

STATEMENT.

The taxpayer, Bayard Edward Ryan, filed a timely Federal income tax return for each of the years 1942 to 1953, inclusive (Pl. Ex. 1; R. 2a, 38a, 50a to 54a, inclusive).

On August 21, 1961, an agent of the Internal Revenue Service issued a summons requiring the taxpayer

to appear, testify, and produce his books for the years 1942 to 1953, inclusive (R. 2a).

At the time the summons was issued the assessment and collection of additional income taxes for each of the years 1942 to 1953, inclusive, were barred by all statutes of limitations except by proof of fraud (R. 50a to 54a, inclusive).

The taxpayer appeared at the time and place designated in the summons but did not produce his books for the statute-barred years (R. 25a, 39a; Appendix A, p. 9). The agent filed a complaint with the District Court to require the taxpayer to produce the books (R. 2a). The sole basis of the agent's claim of right to have the books for the statute-barred years was his own statement that the books were necessary to determine the income tax liability for those years (Appendix A, p. 11). The taxpayer answered that the agent should establish to the satisfaction of the court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe that he had been guilty of fraud (R. 16a).

The District Court agreed with the agent of the Internal Revenue Service and held that the agent, to justify enforcement of the summons to produce the books for statute-barred years, need only say that the books were necessary to his examination (R. 33a, 49a; Appendix A, p. 11). The District Court ruled that the agent need not establish to the satisfaction of the court that a reasonable basis exists for a suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud (R. 37a). The District Court said

that the agent need only say or testify that he believed there was some connection between his examination and the records of the taxpayer (R. 27a, 30a, 31a). The District Court said that any taxpayer, at any time and for any year, whether statute barred or not, can be forced to make a full disclosure of his books and records; that an agent can stop the first man he sees on the street, and make him, then and there, surrender his books and records for any year (R. 32a, 33a).

The Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court and said that the only restriction provided by Congress as to the power of the summons issued by the revenue agent is against making "unnecessary examination or investigation" (Appendix A, pp. 12-14).

REASON FOR GRANTING THE WRIT.

(1) The decision below is in direct conflict with the decisions of the Court of Appeals for the First Circuit in *O'Connor* v. *O'Connell,* 235 F. 2d 185, and *Lash* v. *Nighosian,* 273 F. 2d 185.

In the *O'Connor* case, the court held that mere suspicion of fraud by an agent of the Internal Revenue Service is not sufficient for an examination of statute-barred years and the Government must show that a reasonable basis exists for the suspicion of fraud or that there is probable cause to believe that the taxpayer was guilty of fraud. The court in the *O'Connor* case presented the entire picture of the problem as follows (pp. 369 and 370):

"To make the Congressional purpose expressed in §7605(b) to protect taxpayers from unnecessary examinations truly effective we think the Secretary or his delegate, when a court order is needed to enforce compliance with a summons to testify as to a 'closed' year, should be required to establish to the court's satisfaction that there is probable cause for an investigation into such a year. We think Congress intended to give taxpayers this much protection when the investigation of their returns may reach far back into the past, in this case fourteen years, and in some cases perhaps even further, and that to require such a showing does not impose too heavy a burden upon the tax authorities or unduly restrict or hamper them in tax enforcement.

"Furthermore, this interpretation of §7605(b) is in accord with the limitations upon the inquisitorial powers of government which have become traditional in this country. We agree with Judge Moscowitz' statement in *In Re Brooklyn Pawnbrokers, Inc.*, 39 Fed. Supp. 304, 305 (D.C. E.D. N. Y. 1941) that 'to permit the government to examine as to statute-barred years upon a mere conclusory allegation of fraud is to deprive the taxpayer of that freedom from unreasonable harrassment which he has a right to expect under a democratic form of government.

"This does not mean that proof of fraud is required. It means only that before the tax authorities are entitled to a district court order enforcing a summons directing a taxpayer to testify as to a closed year they must establish to the district court's satisfaction that a reasonable basis exists

> for a suspicion of fraud, or put another way, that there is probable cause to believe that the taxpayer was guilty of fraud in a statute-barred year. We, therefore . . . agree with the rule as it was assumed to be in *Martin* v. *Chandis Securities Co.*, 128 Fed. 2d 731, 735 (C.A. 9, 1942) . . ."

The court of the first circuit in *Lash* v. *Nighosian* (C.A. 1, 1960), 273 F. 2d 185, 188, reiterated and reaffirmed its holding in *O'Connor,* by rejecting the contention that all the Secretary or his delegate needed to show to obtain an order enforcing a summons with respect to a closed year was the honesty of his subjective belief that the taxpayer had been guilty of fraud in such a year. The court, at page 189, pointed out further that:

> "The function of the district courts in these cases as we see it is comparable to the function of a grand jury. It is to prevent the secretary or his delegate from going on a 'fishing expedition' into a taxpayer's books or records for closed years, or from acting upon a mere hunch or a vague surmise, but to permit inspection as to closed years when the court is satisfied, meaning persuaded or content, that the official who issued the summons had a reasonable basis for his belief that the taxpayer had been guilty of fraud in a closed year. . . ."

The circuit court below for the sixth circuit said:

> "We do not follow the decisions in *O'Connor* v. *O'Connell,* 253 F. 2d 365 (C. A. 1), and *Lash* v.

Nighosian, 273 F. 2d 185 (C.A. 1), relied on by taxpayer which represents a minority view."

As to the question presented by this petition, the conflict between the Sixth and First Circuits, is therefore complete.

CONCLUSION.

For the reason stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1963.

APPENDIX A.

1. OPINION OF THE COURT OF APPEALS.

Filed August 1, 1963.

No. 14945

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* v. BAYARD EDWARD RYAN, *Defendant-Appellant.*	ON APPEAL from the order of the United States District Court for the Eastern District of Kentucky.

Decided August 1, 1963.

Before: CECIL, Chief Judge, WEICK, Circuit Judge and MCALLISTER, Senior Circuit Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court enforcing summons issued by an agent of the Internal Revenue Service which required appellant taxpayer to appear, testify and produce his books and records for the years 1942 to 1953 inclusive.

Taxpayer had refused to produce his books and records in response to the summons. His claim was that collection of the tax for the years in question was barred by the statute of limitations except for fraud and therefore the agent

had no right to make the examination. His attorney, however, offered to comply with the summons if the agent satisfied him that there were reasonable grounds for suspicion of fraud.

In the complaint filed in the District Court, it was alleged that "pursuant to a net worth estimate of the defendant's assets which has been conducted by Donald Whelan [the Internal Revenue agent] concerning the period from 1942 through 1953 reasonable grounds exist for a strong suspicion that the defendant . . . has made a fraudulent understatement of income in the income tax returns submitted by him . . . during those years." It was also alleged that the records described in the summons "are relevant and material to the question of tax liability [taxpayer's] . . . and that the summons . . . is not unreasonable under the circumstances."

At the hearing in the District Court, Internal Revenue Agent Whelan testified that as a result of his examination of taxpayer's records for 1954-1958 he determined a deficiency; that it is necessary to examine taxpayer's books and records for the years 1942-1953 for two reasons. First, in order to determine taxpayer's correct tax liability for those years and second, to procure information for net worth computations for the years 1954-1958.[1]

It is taxpayer's position that in order to entitle the government to enforcement of summons with respect to the barred years, it "must establish to the satisfaction of the District Court that a reasonable basis exists for his suspicion of fraud or that probable cause exists to believe the taxpayer was guilty of fraud." He asserts that the testimony of the agent falls short of proving this requirement.

[1]We are advised that since the hearing in the District Court taxpayer settled with the government for the years 1954-1958. This settlement would not affect the right which the government may have to obtain the records to determine taxpayer's correct tax liability for 1942-1953.

The pertinent provisions of the statutes appear in Chapter 78 of the Internal Revenue Code of 1954 under the heading "Discovery of Liability and Enforcement of Title." The title to Subchapter A is "Examination and Inspection."

26 U.S.C. section 7602 provides in part as follows:

> For the purpose of ascertaining the correctness of any return, . . . determining the liability of any person for any internal revenue tax, . . . the Secretary or his delegate is authorized—
>
> (1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;
>
> (2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and
>
> (3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

Section 7603 provides for the service of summons.

Section 7604 confers jurisdiction on the District Court to enforce compliance with the summons.

These sections of the Code confer broad investigative powers on the Secretary to aid him in the performance of his statutory duties and provide a summary procedure in

court to enforce compliance with the summons. Nowhere has Congress required the Secretary to establish, as a condition precedent to the exercise of his right to investigate, that he have a reasonable basis therefor or probable cause to suspect criminality. We do not think this investigative proceeding is at all analogous to a preliminary hearing in a criminal case where probable cause must be shown in order to hold the defendant for the grand jury. No charge has yet been made. The Secretary is desirous only of making an investigation. If he had the facts to establish probable cause he might not need to make any investigation.

The only restriction provided by Congress is against making "unnecessary examination or investigations." 26 U.S.C. § 7605 (b).

We think the District Court was justified in concluding from the testimony of the Internal Revenue Agent that he ought not to disturb the determination made by the Secretary that the investigation was necessary.

To construe the statute as contended by the taxpayer would seriously curtail the powers of investigation granted to the Secretary by Congress. It would impose a condition precedent on the exercise of that power not authorized by Congress. It would permit the court and not the Secretary to determine whether an investigation was necessary. It would hamper the Secretary in the performance of his statutory duties. It would convert a summary enforcement proceeding into a full scale trial to determine whether the Secretary had reasonable grounds or probable cause for the investigation. This is not to say that the court is without power to determine whether the investigation is being made in good faith for one of the purposes authorized by the statute or to relieve against oppressive procedures. *Goldberg* v. *Truck Drivers Local Union No. 299*, 293 F. 2d 807, 814 (CA 6), cert. denied 368 U. S. 938.

In *Peoples Deposit Bank & Trust Co.* v. *United States*, 212 F. 2d 86 (CA 6), cert. denied 348 U. S. 838, we accepted

the testimony of a special agent who had a strong suspicion that a false and fraudulent return was made by the taxpayer. We held that the agent was not required to disclose in detail the facts relative to his investigation nor was the District Court obliged to require proof of facts showing reasonable grounds that the returns were false and fraudulent.

In *Eberhart* v. *Broadrock Development Corp.*, 296 F. 2d 685 (CA 6), cert. denied 369 U. S. 871, we held that the evidence offered by the government was sufficient to justify the order compelling compliance.

In *Goldberg* v. *Truck Drivers Local Union No. 299*, supra, we refused to impose a probable cause condition on the right of the Secretary of Labor to make an investigation under the powers conferred upon him by the Landrum-Griffin Act.

Other cases not requiring the establishment of probable cause as a condition precedent to a tax investigation are *Falsone* v. *United States*, 205 F. 2d 734 (CA 5); *Foster* v. *United States*, 265 F. 2d 183 (CA 2); *McDermott* v. *John Baumgarth Co.*, 286 F. 2d 864, 867 (CA 7); *DeMasters* v. *Arend*, 313 F. 2d 79 (CA 9).

We do not follow the decisions in *O'Connor* v. *O'Connell*, 253 F. 2d 365 (CA 1), and *Lash* v. *Nighosian*, 273 F. 2d 185 (CA 1), relied on by taxpayer which represent a minority view.

Another reason advanced by taxpayer for refusing the examination is that the original returns for the years in question are no longer in existence and without the returns the government could not impeach them for fraud citing *Drieborg* v. *Commissioner*, 225 F. 2d 216 (CA 6). The rule in *Drieborg* does not apply to an investigative proceeding. We cannot anticipate here the government's proof in another case as to the contents of the income tax returns assuming that the originals are unavailable.

The taxpayer further argues that since a deficiency had been assessed as to tax year 1945 in 1948, the Commissioner was required to send a statutory letter requesting a reexamination for that year. 26 U.S.C. § 7605. The government relies on *Norda Essential Oil & Chemical Co.* v. *United States*, 230 F. 2d 764 (CA 2), cert. denied 351 U. S. 964, where it sought records for two tax years which had already been examined but were required for reexamination in determining a tax liability for a third year. The court held that under section 7605 each taxable year was a unit by itself which could be separately examined and that since this was the first inspection for the third year, the records of the other two years, relevant to the third year, could be examined. If the Commissioner was redetermining the tax liability for those two years, a statutory notice would be required. Here, it would appear that the Commissioner could examine any records for the years 1942-1953 in determining tax liability and possibility of fraud for any of those years, with the exception of the year 1945. If a reexamination as to 1945 is sought, a statutory notice appears to be required.

The claim is further made that taxpayer does not have all of the books, records and papers called for in the summons and therefore cannot produce something which he does not have. In the District Court he claimed that he was not required to supply any of the records. Whether he is able to produce any particular record will have to be determined in the District Court.

The judgment of the District Court is affirmed.

2. JUDGMENT OF THE COURT OF APPEALS 34.25

(Caption Omitted) 21.25
Filed August 1, 1963 23.50

Before: CECIL, Chief Judge, WEICK, Circuit Judge and MCALLISTER, Senior Circuit Judge.

APPEAL from the United States District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Kentucky, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby affirmed.

Approved for entry:

(s) Paul C. Weick,
U. S. Circuit Judge.

APPENDIX B.

STATUTES INVOLVED.

Internal Revenue Code of 1954
(26 U. S. C. 1958 ed.)

SEC. 7602. EXAMINATION OF BOOKS AND WITNESSES.

For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, . . . to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be revelant or material to such inquiries.

SEC. 7604. ENFORCEMENT OF SUMMONS.

(a) *Jurisdiction of District Court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which said person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

SEC. 7605. TIME AND PLACE OF EXAMINATION.

* * * * * * * *

(b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.